No. 10393.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

KENNETH BENJAMIN EDWARDS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

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The appellant exhausted all administrative steps within the Selective Service system[1] *and accordingly was in a position to challenge the arbitrariness of the action of the Selective Service agencies in failng to clasisfy him as a regular or duly ordained minister.*

The appellant did not, as did *Nick Falbo*, fail to comply with the order of his board. On the contrary, he complied with it—in that he appeared at the time and place directed in the draft boards order, which he is charged with having violated.

In so reporting, pursuant to the terms of his draft board's order, the appellant took the final step within the Selective Service system to be entitled to challenge the classification in the courts by interposing as a defense

[1]As outlined and required by the Supreme Court in *Falbo v. United States*, 320 U. S. 549, and *Billings v. Truesdell*, 88 L. Ed. (Adv. Op.) 573 (decided March 27, 1944).

to the indictment the arbitrariness and unfairness of his classification. In the *Falbo* case the Supreme Court said:

> "The narrow question therefore presented by this case is whether Congress has authorized judicial review of the propriety of a board's classification in a criminal prosecution for wilfull violation of an order directing a registrant to report for the *last step* in the Selective Service process." (Italics ours.)

In the case at bar, appellant took that "last step" so as to be in a position to challenge the propriety of his classification by the Selective Servce agencies. Again in the *Billings* case the court (at page 581 of 88 L. ed.) reasserted the views expressed by it in the *Falbo* case as to what steps a registrant must take within the Selective Service system to be entitled to defend against an indictment charging a violation of an order by local draft board, where the registrants claim is that the order was void. Said the Court:

> "Moreover, it should be remembered that he who reports at the induction station is following the procedure outlined in the *Falbo Case* for the exhaustion of his administrative remedies. Unless he follows that procedure he may not challenge the legality of his classification in the courts."

The clear import of the *Falbo* and *Billings* decisions is that one who *has* followed the procedure within the Selective Service system by taking and thus exhausting all the administrative steps, then places himself in a position to defend, in the event of a criminal prosecution for a volation of an order of the Selective Service agencies, on the ground that the order offended due process, was arbitrary, or otherwise void.

Otherwise, as the court put it in the *Billings* case (at page 581 of 88 L. ed.) the *Falbo* case becomes a "trap."

> "That would indeed make a trap of the Falbo Case by subjecting those who reported for completion of the Selective Service process to more severe penalties than those who stayed away in defiance of the board's order to report."

The appellant appeared at the office of his local board on June 1, 1942, as directed in the order [R. 24]. As testified by him: "Yes and so I reported as designated there (in the order) at the time." [Rep. 25.] This was admitted by government witness Ida K. Lehr (local draft board clerk). "Defendant appeared on that date and refused to go to camp." [R. 20.]

Although the appellant, by thus reporting, brought himself squarely within the *Falbo* case, the trial court by its rulings upon evidence and its instructions and failure to give instructions expressly ruled that the appellant was not in a position to assert the abritrariness of the action of the Selective Service agencies as a defense. With respect to the question of a fair hearing before the Selective Service agencies the trial court advised the jury:

> "I am not going to have the jury pass on the question of whether it is a fair hearing. That is not their province. The only thing they have to determine is whether there was a violation and if it was wilfull." [R. 25, 26.]

Consistent with this position the trial court ordered stricken, testimony to the effect that the chairman of the appellant's local draft board stated of Jehovah's Witnesses,

> "I think the organization is rotten, it stinks. The whole organization stinks. It is a disgrace to Christianity. I have no use for it at all." [R. 26, 27.]

The trial court additionally refused the proffer of similar testimony from other witnesses. [R. 28, 29.] In the refusal of instructions proffered by the appellant, particularly instructions No. 7, 9, 10, 11, 12, 13, 14 and 15[2] [R. 30-33], the trial court removed from the case, and prevented the jury from passing upon, the appellant's substantive defense.

Conclusion.

Thus the appellant, by the trial court's rulings was, in effect, deprived of his "day in court," by being denied the right to interpose a substantial defense. The judgment of conviction and sentence accordingly deprive him of liberty without due process of law, and should be reversed.[3]

Respectfully submitted,

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[2]These instructions are set forth in the appellant's opening brief, pages 2 and 3, and need not be repeated here.

[3]If this court rejects the appellant's views as to the import of the *Falbo* and *Billings* cases, it should, in any event, reverse the judgment on the ground either that the indictment is defective, or that the evidence demonstrates that the appellant complied with the order, in so far as he is charged in the indictment with having violated it.

The indictment is defective in that it merely charges him with having failed "to report for work of national importance in lieu of induction into the armed forces of the United States." [R. 3.] The indictment does not allege that he refused to submit to induction by declining to proceed to a camp as directed by his local board.

In so far as the limited charge in the indictment is concerned, the evidence demonstrates that the appellant complied with the order. He reported as directed in the order. Upon the specific and limited charge set forth in the indictment, the appellant should have been acquitted. The evidence does not support the verdict or the judgment.